(2)

No. 94-1841

Supreme Court, U.S.
FILED
JUL 5 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

ROBERT RUYLE, ELIZABETH RUYLE, HARVEY FRANSEN, MAJORIE FRANSEN, YVONNE FRANSEN, GEORGE FRANSEN, JAMES FRANSEN,

Petitioners,

v.

CONOCO, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLYDE A. MUCHMORE
(Counsel of Record)
HARVEY D. ELLIS, JR.

- Of The Firm -

CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys For Respondent

July, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did Conoco sufficiently preserve for appeal the issue of whether petitioners were foreclosed by Oklahoma law of collateral estoppel from bringing claims based on Conoco's failure to drill an additional gas well which the Oklahoma Corporation Commission had expressly prohibited in proceedings where petitioners were parties supporting the additional well?

2. Regardless of whether collateral estoppel foreclosed petitioners' action, is the Court of Appeals' decision correct on the additional ground set forth in its opinion, and not challenged here, that Oklahoma law prohibits a collateral attack on an Oklahoma Corporation Commission order which is not facially void?

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT

Respondent Conoco, Inc. was formerly named "Continental Oil Company" (Aplt. App. 1, caption). Respondent's parent company is E.I. du Pont de Nemours and Company. Respondent's subsidiaries which are not wholly owned are:

1 Big Sky Of Montana Realty, Inc.
2 C&L Processors Partnership
3 Cit-Con Oil Corporation
4 Conch International Methane Limited
5 Conoco Arabia Ltd.
6 Conoco Iraq Ltd.
7 Conoco Mexico Ltd.
8 Conoco Oriente Ltd.
9 Conoco Peru Ltd.
10 Conoco Venezuela Ltd.
11 Cure Inc.
12 Du Pont Energy Company
13 Excel Paralubes
14 Felix Oil Company
15 Gulf Coast Fractionators
16 Jupiter Holding, Inc.
17 Kettleman North Dome Association
18 Marine Preservation Association
19 Nelson Industrial Steam Company (NISCO)

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT – Continued

20 Oberrheinische Mineraloelwerke GmbH (OMW)
21 Petco Enterprises Ltd.
22 Petrocokes, Ltd.
23 Phoenix Park Gas Processors, Ltd.
24 Pocahontas Gas
25 Siam Conoco Land Ltd.
26 The Standard Shale Products Company
27 Tidelands Royalty Trust
28 Venture Coke Company

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT ii

TABLE OF AUTHORITIES v

ADDITIONAL STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

Oklahoma Corporation Commission Proceedings 2

District Court Proceedings 6

The Court of Appeals' Decision 10

SUMMARY OF ARGUMENT 10

ARGUMENT AND AUTHORITIES 11

I. THE LEGAL ISSUE OF WHETHER PETITIONERS' CLAIMS WERE BARRED BY COLLATERAL ESTOPPEL WAS SUFFICIENTLY PRESERVED FOR APPEAL 11

II. OKLAHOMA'S PROHIBITION ON COLLATERAL ATTACKS OF COMMISSION ORDERS INDEPENDENTLY SUPPORTS THE RESULT IN THIS CASE 20

III. PETITIONERS' OTHER ARGUMENTS WERE NOT RAISED BELOW AND ARE MERITLESS 24

Due Process 24

Standard of Proof 27

Notice in Commission Proceeding 29

Right to Jury Trial 30

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Amoco Production Co. v. Heimann, 904 F.2d 1405 (10th Cir.), *cert. denied*, 498 U.S. 942 (1990).....23, 26

Carris v. Thomas, 1995 Westlaw 142562, 1995 Okla. LEXIS 44, Docket No. 82,952 (Okla. April 4, 1995)..... 27

Chappell & Co. v. Frankel, 367 F.2d 197 (2nd Cir. 1966)..... 18

Delta Air Lines, Inc. v. Rosemary August, 450 U.S. 346 (1981)..... 24

Drake v. Southwest Davis Unit, 698 P.2d 15 (Okla. 1985).....21, 22

Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988)..... 14

Fent v. Oklahoma Nat. Gas Co., 1994 Westlaw 534502, 1994 Okla. LEXIS 125, Docket No. 79,243 (Okla. October 4, 1994) 22, 27, 30

Glaros v. H.H. Robertson Co., 797 F.2d 1564 (Fed.Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987)..... 18

Harry R. Carlile Trust v. Cotton Petroleum, 732 P.2d 438 (Okla. 1986), *cert. denied*, 483 U.S. 1021 (1987) 2, 3, 29

Holley v. Northrop Worldwide Aircraft Services, Inc., 835 F.2d 1375 (11th Cir. 1988).....16, 17

Jurgens v. McKasy, 927 F.2d 1552 (Fed.Cir.), *cert. denied*, 502 U.S. 902 (1991).....15, 18

Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365 (9th Cir. 1987).....14, 18

LaRocca v. Gold, 662 F.2d 144 (2nd Cir. 1981) 16

TABLE OF AUTHORITIES – Continued

Page

Leck v. Continental Oil Co., 800 P.2d 224 (Okla. 1989) 26

Leck v. Continental Oil Co., 971 F.2d 604 (10th Cir. 1992) 5, 26

Locricchio v. Legal Services Corp., 833 F.2d 1352 (9th Cir. 1987) 17

Lujan v. United States Dept. of the Interior, 673 F.2d 1165 (10th Cir.), *cert. denied*, 459 U.S. 969 (1982) 15

Mayer v. Tidewater Oil Co., 218 F. Supp. 611 (W.D. La. 1963) 23

Mize v. Exxon Corp., 640 F.2d 637 (5th Cir. 1981) 23

Monson v. State ex rel. Oklahoma Corporation Comm'n, 673 P.2d 839 (Okla. 1983) 3

Mustang Production Co. v. Corporation Comm'n of the State of Oklahoma, 771 P.2d 201 (Okla. 1989) 27, 28

Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979) 30

Pelican Production Corp. v. Wishbone Oil & Gas, Inc., 746 P.2d 209 (Okla.Ct.App. 1987) 21, 22

Savarin Corporation v. National Bank of Pakistan, 447 F.2d 727 (2nd Cir. 1971) 18

SKZ, Inc. v. Petty, 782 P.2d 939 (Okla. 1989) 21

State ex rel. Commissioners of the Land Office v. Corporation Comm'n, 590 P.2d 674 (Okla. 1979) 22

Stewart v. United States, 186 F.2d 627 (7th Cir.), *cert. denied*, 341 U.S. 940 (1951) 15

Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir.), *cert. denied*, 375 U.S. 942 (1963) 25

TABLE OF AUTHORITIES – Continued

Page

Westwood Chemical Co., Inc. v. Kulick, 656 F.2d 1224 (6th Cir. 1981) 15

Whalen v. Unit Rig, Inc., 974 F.2d 1248 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1417, 122 L. Ed.2d 787 (1993) 16

Woods Petroleum Corp. v. Sledge, 632 P.2d 393 (Okla. 1981) 21

UNITED STATES CODE

28 U.S.C. § 1292(a)(1) 18

FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P. 12(h)(3) 21

Fed.R.Civ.P. 50 6

Fed.R.Civ.P. 50(a) ..... *passim*

Fed.R.Civ.P. 50(b) 10, 11

Fed.R.Civ.P. 51 20

OKLAHOMA STATUTES

12 Okla.Stat. 1991, Ch.15, App.2, Rule 1.200(C)(B) 23

52 Okla.Stat. 1991, § 87.1(a) 2

52 Okla.Stat. 1991, § 87.1(e) 1

52 Okla.Stat. 1991, § 111 ..... 1, 20, 24

OTHER AUTHORITIES

5A J. Moore, MOORE'S FEDERAL PRACTICE ¶50.12 (2d ed. 1995) 14

5A J. Moore, MOORE'S FEDERAL PRACTICE ¶51.04 (2d ed. 1995) 20

TABLE OF AUTHORITIES – Continued

Page

9 J. Moore, MOORE'S FEDERAL PRACTICE ¶110.07 (2d ed. 1995) 19

Restatement of Judgments (Second) § 28(4) (1982) 29

Stern, Gressman, Shapiro and Geller, SUPREME COURT PRACTICE § 6.26 (7th ed. 1993) 24

9A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 2536 (1995) 13

9A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 2540 (1995) 14

9A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 2553 (1995) 20

10 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 2715 (1983) 18

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTORY PROVISIONS INVOLVED

The following relevant statutory provisions under Oklahoma law are not set forth in the brief of petitioners.

52 Okla.Stat. 1991, § 87.1(e) provides in relevant part:

> The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the [Oklahoma Corporation] Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited.[1]

52 Okla.Stat. 1991, § 111 provides in relevant part:

> No collateral attack shall be allowed upon orders, rules and regulations of the [Oklahoma Corporation] Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the [Oklahoma] Supreme Court.

STATEMENT OF THE CASE

Five of the seven petitioners leased mineral interests to Conoco, Inc. ("Conoco") in Section 14, T14N, R16W,

[1] The statute was amended effective July 1, 1993, but the amendment was subsequent to trial and the quoted language is unchanged.

Custer County, Oklahoma ("Section 14"), and sued Conoco alleging contractual and tortious breaches of the duty to prevent drainage by drilling an additional offset well in Section 14. Petitioner's Appendix ("Pet. App.") at 2. The other two petitioners (the Ruyles), although not Conoco's lessees, joined the other five petitioners, alleging only breach of fiduciary obligations by failing to drill an offset well. Pet. App. at 2 n.1.

Oklahoma Corporation Commission Proceedings: By order of the Oklahoma Corporation Commission ("Commission") Section 14 and adjacent sections were established as single drilling and spacing units of 640 acres each for production from a common source of supply, pursuant to 52 Okla.Stat. 1991, § 87.1(a). Pet. App. at 3-4. The spacing order was in effect long before and at all relevant times relating to petitioners' claims herein. The spacing order allowed a single well to be drilled in Section 14, and Conoco was designated the operator of that well.[2] Additionally, Oklahoma statutory law prohibited anyone including Conoco from drilling any further wells into the spacing unit, except as permitted by the Commission. 52 Okla.Stat. 1991, § 87.1(e) provides:

> The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing

---

[2] "A spacing order creates the unit, pools royalty interests within the unit, directs that only one well be drilled in the unit within a specific location and prohibits the drilling of a well at another location or operating a well drilled in violation of the spacing order." *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 442 n.19 (Okla. 1986), *cert denied*, 483 U.S. 1021 (1987).

> order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited.

The Commission acts in an "adjudicative capacity" when it makes orders establishing and allowing exceptions relating to drilling and spacing units. *Harry R. Carlile Trust v. Cotton Petroleum, supra,* 732 P.2d at 441-42. The Commission's adjudicative power is vested by Oklahoma constitutional mandate. *Monson v. State ex rel. Oklahoma Corporation Comm'n,* 673 P.2d 839, 842 and ns. 6 and 10 (Okla. 1983). When the Commission acts in an adjudicative capacity it is charged "with the responsibility of a 'court of record' " and is "treated as the functional analogue of a court of record." *Id.*

In October 1990 one of the interest holders in Section 14, Great Bear Exploration, Inc. ("Great Bear") filed an application with the Commission to allow Great Bear to drill an additional well in Section 14. Pet. App. at 4. In January 1991 petitioners each executed contracts with Great Bear, authorizing Great Bear to represent their interests in seeking the additional well and to contend that Section 14 was not being adequately protected from drainage. Pet. App. at 4. Petitioners additionally personally intervened to support Great Bear's application in the Commission, and appeared at each of the hearings through their own counsel. Pet. App. at 4, 12-13. Numerous interest owners including Conoco opposed the application; Conoco also contended that if any additional

well was allowed, Conoco and not Great Bear should be named the operator of that well.[3]

Great Bear and petitioners asserted in the Commission, as petitioners did in this case, that an additional well in Section 14 was needed to protect the unit from drainage. Three levels of Commission proceedings were conducted: The first was the full adjudicatory hearing before the Commission's Administrative Law Judge, resulting in an Initial Report; the second was an appeal to a separate Administrative Law Judge, resulting in an Appellate Report; and the third was an appeal to the full Commission, resulting in the Commission's final Order. Great Bear and petitioners pursued the application through all three levels, and the application and allegations of inadequate protection from drainage were found meritless at every level. Great Bear alone then appealed the Commission's order to the Oklahoma Supreme Court, and the order was affirmed. Pet. App. at 5.

The specific factual findings of the Commission and its two Administrative Law Judges were contained in their separate orders following the three separate proceedings in which petitioners participated. Each of these orders separately concluded, upon review of the evidence, that granting an additional well was not in the interest of protecting correlative rights of all the affected mineral owners. Each of the orders also concluded that

---

[3] Appellant's Appendix in the Tenth Circuit ("10th Cir. Aplt.App.") at 387 (Commission's Administrative Law Judge's Order).

there was insufficient evidence of uncompensated drainage from Section 14.[4] The Commission additionally specifically found that Conoco had acted prudently by resisting the application to drill an additional well:

> The operator of a unit like Section 14 is obligated to take only that unit's fair share of gas from a well in the unit. As noted in *GMC Oil and Gas Co. v. Texas Oil and Gas Corp.*, 586 P.2d 731 (Okla. 1978), there is an affirmative duty on the part of that operator to not only protect correlative rights of owners in Section 14, but also to avoid harming the rights of offset owners through the taking of a disproportionate share of gas in the common source of supply. Protestants, including Conoco, have acted prudently in Section 14 by recovering a fair share of the gas but resisting the attempt of Great Bear to recover more than such fair share.

10th Cir. Aplt.App. at 403, ¶6.

Throughout all of these proceedings Conoco remained prohibited by Oklahoma statutory law and the Commission's pooling order from drilling an additional well into Section 14 – as did all parties including petitioners and Great Bear. This prohibition has continued

---

[4] Uncompensated drainage, *i.e.*, drainage not compensated by counter-drainage, is the test for whether an additional well within a Commission drilling and spacing unit is warranted. *Leck v. Continental Oil Co.*, 971 F.2d 604, 606 (10th Cir. 1992). Drainage and correlative rights are directly related, and a Commission finding as to uncompensated drainage collaterally estops mineral owners who participate in the proceeding from relitigating that issue in a civil claim against the operator. *Id.* at 606-607.

from the time the spacing unit was established, throughout the Oklahoma Supreme Court's affirmance of the Commission's order rejecting the application for another well, and was still in effect when this brief was filed.

District Court Proceedings: Petitioners nevertheless brought this action against Conoco for its failure to drill the additional well into Section 14 which Conoco was indisputably prohibited by state law from drilling. Pet. App. at 5. Conoco defended these claims throughout the litigation by relying on the relevant Commission proceedings and orders discussed above, and by specifically relying on Oklahoma law of collateral estoppel.

Petitioners' assertion at p.5 that "[t]he only time this issue was asserted by Respondent prior to its brief before the Tenth Circuit, was in the pre-trial motion for summary judgment" is incorrect. Specifically, Conoco raised the issue (a) in its pleadings and in a status report, as recognized in the district court's order denying summary judgment (10th Cir. Aplt.App. 219, n.5); (b) in a pretrial motion in limine (10th Cir. Aplt.App. 200); (c) in the Final Pretrial Order (10th Cir. Aplt.App. 227-28, 233-34, 241-43); in its February 3, 1992 Trial Brief (district court Doc. 95); in requested but refused jury instruction nos. 11 and 12 (10th Cir. Aplt.App. 309-310, discussed below); *and* in post-trial motions discussed below.

Indeed, Conoco contends it also raised the collateral estoppel issue in its Fed.R.Civ.P. 50 motion for judgment as a matter of law, although the Court of Appeals' analysis proceeds on the assumption that Conoco did not do so. Conoco initially moved for judgment as a matter of law under Fed.R.Civ.P. 50(a) at the close of plaintiffs' evidence. Portions of the argument on that motion are

quoted and summarized in the Court of Appeals' opinion (Pet. App. at 9-10), and portions are also quoted by petitioners. At the close of all the evidence Conoco renewed its motion for judgment as a matter of law, but was given no opportunity by the district court for further argument. 10th Cir. Aplt.App. at 506.

As the Court of Appeals observed, the district court expressed sympathy with Conoco's contention that it was legally foreclosed from drilling the well which plaintiffs sued Conoco for *not* drilling, but expressed its confusion over the dichotomy under Oklahoma law between the jurisdiction of the Commission and the courts to decide civil claims like this one. Pet. App. at 9, quotation and note 6. The district court therefore allowed petitioners' claims to be submitted to the jury, which awarded actual and punitive damages.[5]

Conoco shows below that it was not necessary for it to raise the collateral estoppel issue in the motion for judgment as a matter of law to preserve the question for appeal. However, the concluding portion of the argument on the Fed.R.Civ.P. 50(a) motion – which is *subsequent* to

---

[5] The district judge initially concluded that petitioners claim for punitive damages did not fall within the recent amendment to Oklahoma law requiring a finding of clear and convincing evidence of wanton conduct. 10th Cir. Aplt.App. at 513-14. When Conoco pressed the applicability of the amendment the judge stated he would have preferred to base his ruling on that ground, but since Conoco might be correct he would "make the necessary clear and convincing findings, if it is required to do so," and then briefly recited the necessary findings in the language of the statute. *Id.* There was utterly no basis for such a finding, an issue which the Court of Appeals found unnecessary to reach. Pet. App. at 10.

the portion of the argument quoted by petitioners at 9-10, shows that Conoco *did* renew the grounds set forth in the motion for summary judgment in the Fed.R.Civ.P. 50(a) motion. First Conoco's counsel explained the "anomalous situation" of holding Conoco liable for failing to drill a second well which it was prohibited from drilling:

> The Commission having found that we shouldn't, and to do so would violate a correlative right of the offsets, what if I go drill that well? I have automatically been placed in the position of breaching my duty to all of these offsets. Now I get sued by them. So I get recovery against me from this jury. The Commission, having found I didn't need to drill the well, prevents me from drilling the well. I go drill it because I don't want to get this drainage. Now I get hit by the offsets. I'm in a real anomalous situation, your Honor.

10th Aplt. Supp. App. at 571-72. The trial judge responded that he was "acutely aware of that," but that in view of the lack of a "clear-cut definition yet as to who controls what" as between the courts and the Commission, he believed he had no choice but to submit the case to the jury. *Id.* at 572. Conoco's counsel then made clear that he would not press the argument further *if* the judge had already decided he was going to rule the same way he had on the summary judgment motion:

> MR. GRIMES: I guess all the protection I'm arguing for is that *if you are going to turn me down relative to those, and you did in the Motion for Summary Judgment,* I have got to at least have the opportunity –
>
> THE COURT: *I'm going to. I'm not trying to shorten your argument, but I'm going to in this case,*

> *because it is not one that is so clear to me that, as a matter of law, I probably ought to take it away from the jury at this point.*

(Emphasis supplied.) *Id.* at 573. Then the court cautioned Conoco's counsel that although the court would allow introduction of evidence of the Commission proceedings, "I can't allow you to construe that as telling this jury or even implying that they are absolutely bound by that." *Id.* The court then denied all of the motions for judgment as a matter of law. *Id.* at 574.

Petitioners' argument here that Conoco did not request judgment as a matter of law based on the Commission's findings is directly contrary to what their counsel urged to the district court when the motion was being argued. As reflected in the Court of Appeals' opinion, petitioners' counsel urged to the district court that while the preclusive effect of the Commission's orders "may be an argument that [Conoco] can raise on appeal," the district court should "follow the precedents established, which are as I have stated, and *the case should not have judgment entered in favor of the Defendants on the basis of anything the Corporation Commission has done.*" (Emphasis supplied.) Pet. App. at 10.

Finally, in its motion for judgment as a matter of law under Fed.R.Civ.P. 50(b) Conoco complained that the district court had erred in failing to grant the Fed.R.Civ.P. 50(a) motion (10th Cir. Aplt.App. at 326). In briefing the motion and urging the impropriety of punitive damages and cancellation of Conoco's lease, Conoco contended that the evidence showed that "its actions were justified and in accordance with the rules, regulations and orders of the [Commission]" (*id.* at 330); that the Commission "is

the administrative body vested with the exclusive authority to authorize the drilling of another well" (*id.* at 331); and that "[p]laintiffs' evidence showed Defendant complied with the [Commission's] orders by refusing to drill a protection well." *Id.* at 335.

The Court of Appeals' Decision: The Court of Appeals has reversed on two independently sufficient grounds pressed on appeal by Conoco – only *one* of which is cited here by petitioners as a basis for review by certiorari. The first ground, which petitioners do challenge, is that collateral estoppel bars success on their claim since the dispositive facts have been decided against them. The second ground, which petitioners do *not* challenge, is that the petitioners' claim constitutes a "collateral attack" on the Commission's order:

> Conoco also argues that a state statute specifically prohibits plaintiffs' collateral attack on the Commission's order. . . . We further hold that Conoco has established the applicability of both the doctrine of collateral estoppel and the state statute prohibiting collateral attacks upon Commission orders.

Pet. App. at 6.

SUMMARY OF ARGUMENT

Conoco did, but was not required to, raise the collateral estoppel defense in its motion for judgment as a matter of law. A motion for judgment as a matter of law is required to test the sufficiency of the adversary's evidence. It is also sufficient to preserve the right to appellate review on other errors, *i.e.*, issues of law, but is not

necessary if such issues are otherwise raised in the district court. This principle applies whether the error of law is raised throughout every step of the litigation – as in fact occurred here – or solely in a motion for summary judgment, as incorrectly contended by petitioners. Conoco preserved the question not only in its pleadings, its motion for summary judgment, the pretrial conference order, a pretrial motion in limine, and proposed jury instructions, but also in its motions for judgment as a matter of law under Fed.R.Civ.P. 50(a) and (b).

Even if Conoco had not raised collateral estoppel, however, the Court of Appeals' decision would be correct on the alternate ground, not challenged by petitioners here, that their action seeking to hold Conoco liable for failing to drill the additional well constituted a collateral attack on the Commission's order preventing the drilling of that well.

The remaining contentions of petitioners (their Propositions II - V) were not raised in the Court of Appeals, and are plainly meritless, as discussed in Proposition III below.

ARGUMENT AND AUTHORITIES

I. THE LEGAL ISSUE OF WHETHER PETITIONERS' CLAIMS WERE BARRED BY COLLATERAL ESTOPPEL WAS SUFFICIENTLY PRESERVED FOR APPEAL

Petitioners incorrectly characterize Conoco's appeal as one from the denial of a motion for summary judgment. Conoco appealed the *final* judgment in this case –

raising as its primary argument that petitioners were foreclosed by Oklahoma law of collateral estoppel and collateral attack from claiming damages for Conoco's failure to drill a well which it was prohibited from drilling, and which the Commission had expressly disallowed in proceedings where petitioners had advanced the same factual assertions. Conoco's contention that petitioners are collaterally estopped from relitigating those assertions was not restricted to its summary judgment motion, as discussed above, but was made at every opportunity throughout the litigation *including* in the motion for judgment as a matter of law.

However, assuming *arguendo* that Conoco did not adequately raise the issue in the motion for judgment as a matter of law, the question presented is whether the legal contention was adequately preserved by raising it elsewhere – not whether Conoco could appeal from the denial of summary judgment. The Court of Appeals recognized this in its holding rejecting petitioners' argument:

> Motions under Fed.R.Civ.P. 50(a) for judgment as a matter of law test whether there is a "legally sufficient evidentiary basis for a reasonable jury to find" for the moving party. These motions thus challenge the sufficiency of the evidence rather than the correctness of questions of law. A party who properly raises an issue of law before the case goes to the jury "need not include the issue in a motion for a directed verdict in order to preserve the question on appeal." [Citations omitted.]

Pet. App. at 7. This basis for the Court of Appeals' holding, along with the authority cited by the court, is

wholly ignored by petitioners. As the Court of Appeals observed in its opinion, "the parties and the trial court agreed that the issue of collateral estoppel was a legal question separate from the sufficiency of the evidence." Pet. App. at 7. That is why petitioners' counsel – in the very hearing where it is contended Conoco did not sufficiently preserve the issue of collateral estoppel – resisted Conoco's motion for judgment as a matter of law by asserting to the district court that the court had:

> already ruled in denying the motion for summary judgment, which was a motion based upon *a legal argument rather than factual,* that the doctrines of collateral estoppel and res judicata or res judicata in the Corporation Commission's ruling on the Great Bear application, do not deprive this Court of jurisdiction to determine the private right dispute.

(Emphasis supplied.) Pet. App. at 10. That is also why petitioners' counsel immediately thereafter told the district court that "it may be an argument that [Conoco] can raise on appeal. . . . " *Id.*

The Court of Appeals' holding is amply supported by authority which petitioners do not dispute. While a motion for judgment as a matter of law is necessary to challenge the sufficiency of the evidence,[6] such a motion

---

[6] Fed.R.Civ.P. 50(a) provides that a motion for judgment thereunder is to test for whether there is a "legally *sufficient evidentiary basis* for a reasonable jury to find" for the opposing party on an issue. (Emphasis supplied.) *See* 9A Wright, Miller & Cooper, Federal Practice and Procedure § 2536 (1995) ("It is thoroughly established that the *sufficiency of the evidence* is not

is not necessary to preserve the right to appellate review on issues of law. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987) (holding motion in limine sufficient to preserve issue of law on statute of frauds: "As long as a party properly raises an issue of law before the case goes to the jury, it need not include the issue in a motion for a directed verdict in order to preserve the question on appeal."). *See also* 9A Wright, Miller & Cooper, Federal Practice and Procedure § 2540 (1995) (discussing Fed.R.Civ.P. 50(b) motion, stating: "If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial, ... ").[7]

This applies equally to denials of summary judgment motions and other pretrial rulings. *See Equal Employment*

---

reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court." (Emphasis supplied.)).

[7] *See also* 5A Moore's Federal Practice ¶50.12 at p. 50-106 (2d ed. 1995) ("The court of appeals will not pass on the *sufficiency of the evidence* supporting a judgment, where the appellant did not move in the trial court for judgment as a matter of law under Rule 50, except to the extent that it will determine if there was a complete absence of evidence to support the verdict, without regard to sufficiency, or if there was any plain error resulting in a manifest miscarriage of justice." (Emphasis supplied.) Even if Conoco's contention was regarded as one raising sufficiency of the evidence this case would fall within both exceptions, "complete absence of evidence" and "plain error," inasmuch as Conoco could not be held liable for breaching a duty by failing to perform an act which was prohibited by state law.

Opportunity Comm'n v. Sears, Roebuck & Co., 839 F.2d 302, 353 n.55 (7th Cir. 1988) (reviewing denial of summary judgment motion, explaining: "As with other interlocutory orders that arise during the course of a case, denials of summary judgment are merged into a final judgment and then may be appealed. [Citations omitted.]");[8] *Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed.Cir.), *cert. denied*, 502 U.S. 902 (1991) (cited by Court of Appeals, Pet. App. at 7).

Collateral estoppel and res judicata present questions of law, and have sometimes been allowed to be raised on appeal although never presented at all in the trial court. *See Lujan v. United States Dept. of the Interior*, 673 F.2d 1165, 1167-68 (10th Cir.), *cert. denied*, 459 U.S. 969 (1982),[9] citing *inter alia Westwood Chemical Co., Inc. v. Kulick*, 656

---

[8] *See also Stewart v. United States*, 186 F.2d 627, 634 (7th Cir.), *cert. denied*, 341 U.S. 940 (1951) (deciding issues raised on appeal from denial of summary judgment motion, distinguishing appeal after final judgment from interlocutory appeal, noting that there was no dispute as to any issue of fact and holding the court "may properly consider any issue of law presented by the record.").

[9] Notably, in *Lujan* the related state court proceedings were finally concluded during the pendency of the federal appeal, as was also true here since the Oklahoma Court of Appeals affirmed and the Oklahoma Supreme Court denied certiorari on Great Bear's appeal from the Commission's order during the pendency of appeal in this case. The court in *Lujan* applied collateral estoppel, which it distinguished from *res judicata*, after finding that "the peculiar facts of this case and the interests of judicial economy suggest" the propriety of considering the issue for the first time on appeal. *Id.*, 673 F.2d at 1168.

F.2d 1224, 1227-28 (6th Cir. 1981) (indicating that corollary defense of *res judicata* should be considered whenever brought to the court's attention, discussing cases where it was raised at various stages of litigation including for the first time in motion for rehearing). *Cf., LaRocca v. Gold,* 662 F.2d 144, 147-48 (2nd Cir. 1981) (*sua sponte* applying collateral estoppel arising from state court proceedings, which had been raised as a defense in the district court, although both sides to the appeal urged the court to resolve the merits of the case).

Petitioners' assertion that Conoco planted a "time bomb set to go off on appeal" (p.5, Para. I) is particularly inappropriate after having told the district court in the Fed.R.Civ.P. 50(a) hearing that collateral estoppel "may be an argument that [Conoco] can raise on appeal. . . . " Pet. App. at 10. The "bomb" language which petitioners attribute to *Whalen v. Unit Rig, Inc.,* 974 F.2d 1248, 1251 (10th Cir. 1992), *cert denied,* 113 S.Ct. 1417 (1993) is an inaccurate quotation by petitioners of the statement in *Holley v. Northrop Worldwide Aircraft Services, Inc.,* 835 F.2d 1375, 1377 (11th Cir. 1988) that: "Summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal; . . . " The bomb metaphor is inept here for the very reason the Court of Appeals rejected petitioners' argument – that "plaintiffs fail to make the critical distinction between summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide." Pet. App. at 7. *Holley* actually *supports* the Court of Appeals' holding in this case. The court held that no appeal from denial of summary judgment was available to a party who *admits* that the evidence at trial was "sufficient to be presented

to the jury," or was "supplemented or changed in some manner favorable to the party who opposed summary judgment." *Id.* at 1378. The court later continued:

> We hold only that a party may not rely on the undeveloped state of the facts at the time he moves for summary judgment to undermine a fully-developed set of trial facts which militate against his case.

Holley, supra, 835 F.2d at 1378.

Neither the Court of Appeals, the district court, nor petitioners have ever suggested that this is what occurred in the instant case. The bar to plaintiffs' claim was both purely legal and absolute – no amount of evidence on the merits could ever have changed the result. Moreover, Conoco raised early and throughout the litigation the dispositive legal contention that petitioners' claims were barred by collateral estoppel – and the district court was emphatically joined by petitioners in declaring that the legal issue raised should not prevent submission of the case to the jury, but should be one reserved for appeal. Pet. App. at 9-10.

None of the cases cited by petitioners address, much less dispute this analysis. For example, in the Ninth Circuit case which petitioners quote at length at pp.7-8 as their primary authority, *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987), the court rejected an attempt to review denial of a motion for summary judgment on tortious interference and defamation claims after having tried the claims to a jury. No issue was presented there as to whether a Fed.R.Civ.P. 50(a) motion is required to preserve error on a question of law otherwise raised by appellant in the court below – and indeed

the Ninth Circuit fully agrees with the holding below as to that issue. *See Landes Constr. Co. v. Royal Bank of Canada, supra* (decided the same day as *Locricchio*), cited by the Court of Appeals in support of its holding, Pet. App. at 7. Similarly, a case from the Federal Circuit Court of Appeals is cited by and supports the Court of Appeals' decision, Pet. App. at 7, *Jurgens v. McKasy, supra* – confirming the irrelevance of the Federal Circuit case which petitioners incorrectly attribute to the District of Columbia Circuit (Pet. at 6), *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed.Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987) – and which also does not concern raising a legal issue omitted from a Fed.R.Civ.P. 50(a) motion.

Moreover, even the general proposition for which petitioners' cases are cited, although irrelevant here, is of questionable validity. For example, the Second Circuit decision petitioners cite in their petition at 6, *Chappell & Co. v. Frankel*, 367 F.2d 197 (2nd Cir. 1966), was not an appeal from a final decision at all. It was an attempted *interlocutory* appeal from denial of summary judgment under 28 U.S.C. §1292 (a)(1) on the ground that an injunction was sought. The Second Circuit has allowed an appeal from a denial of a summary judgment *after* final judgment, *Savarin Corporation v. National Bank of Pakistan*, 447 F.2d 727, 728 and 732 (2nd Cir. 1971), a decision which post-dates *Chappel*.[10] *See also* 10 Wright, Miller & Cooper, Federal Practice and Procedure § 2715 at pp. 636-37 (1983) (appeal from the denial of a motion for summary judgment must await "the entry of judgment following the trial on the merits."). *Cf.*, 9 Moore's Federal

---

[10] Petitioners misstate the date of *Chappel* which is 1966, not 1946.

Practice ¶110.07 at pp.41-42 (2d ed. 1995) (rulings on pretrial matters including denials of summary judgment motions are "generally reviewable only to the extent that they affect the final judgment.").

Other contentions in petitioners' first proposition merit little discussion. Conoco did not abandon its claim that petitioners were barred by collateral estoppel, as the Statement of the Case above shows, and is reflected in the Court of Appeals' opinion, Pet. App. at 8-10. Failure of Conoco to object to the jury instruction relied upon by petitioners also did not waive Conoco's other repeated and emphatic objections that petitioners were collaterally estopped from pursuing this claim (Pet. App. at 10-11), particularly since the objections go to the issue of whether the question should go to the jury at all, and would not be curable by a reworded instruction. In any event, the district court refused Conoco's requested two jury instructions which would have explicitly precluded any recovery by petitioners based upon the Commission's spacing order and its order disallowing an additional well. Conoco's Requested Instruction 11 recited that the Commission "ordered that only one well could produce from the Des Moines common source of supply underlying Section 14;" that the Commission had "denied an application seeking authority to drill an additional well" in Section 14; and:

> You are instructed that the plaintiffs can recover no damages on their claims relating to their breach of duties for the failure to drill an additional well in Section 14 as the drilling of such an additional well is prohibited as a matter of law and by order of the Oklahoma Corporation Commission.

10th Cir. Aplt.App. at 309. Aside from this, the authorities are in agreement that Fed.R.Civ.P. 51 "does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, as long as it is clear that the trial judge understood the party's position." 5A Moore's Federal Practice ¶51.04 at p.51-33. (2d. ed. 1995). *See also* 9A Wright, Miller & Cooper, Federal Practice and Procedure § 2553 at p.411 (1995) ("The failure to object may be disregarded if the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing."). The trial judge in the instant case had made this imminently plain in the Fed.R.Civ.P. 50(a) hearing: "I'm not trying to shorten your argument, but I'm going to in this case, because it is not one that is so clear to me that, as a matter of law, I probably ought to take it away from the jury at this point." 10th Aplt. Supp. App. at 573.

II. OKLAHOMA'S PROHIBITION ON COLLATERAL ATTACKS OF COMMISSION ORDERS INDEPENDENTLY SUPPORTS THE RESULT IN THIS CASE

Even if petitioners' contention that Conoco was procedurally barred from relying on collateral estoppel had merit, certiorari would be unwarranted here, since petitioners do not challenge an independent and non-waivable basis for the Court of Appeals' holding: that petitioners' action constituted an impermissible collateral attack on the Commission's orders disallowing more than a single well in Section 14.

Oklahoma prohibits collateral attacks on the Commission's orders. 52 Okla.Stat. 1991, § 111 provides:

> No collateral attack shall be allowed upon orders . . . of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders . . . to the Supreme Court.

See Woods Petroleum Corp. v. Sledge, 632 P.2d 393, 396 (Okla. 1981).[11]

Under Oklahoma law the courts lack jurisdiction to entertain a claim which constitutes a collateral attack on a Commission order,[12] and jurisdiction cannot be waived. Fed.R.Civ.P. 12(h)(3). Hence, petitioners' assertion that Conoco waived the collateral estoppel issue has no application as to the Court of Appeals' holding that petitioners' claim constitutes a collateral attack on the Commission's order.

The Oklahoma courts have described the meaning of the term "collateral attack" as follows:

> "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law; that is, in some other way than by appeal, writ of error, certiorari, or motion for a new trial."

---

[11] The only method to successfully launch a collateral attack on a Commission order is to show on the face of the order that it is void because the Commission lacked jurisdiction over subject matter, the parties, or to pronounce the particular decision. *SKZ, Inc. v Petty*, 782 P.2d 939, 943 (Okla. 1989).

[12] *E.g., Drake v. Southwest Davis Unit*, 698 P.2d 15, 16-17 (Okla. 1985); *Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209, 212 (Okla.Ct.App. 1987).

State ex rel. Commissioners of the Land Office v. Corporation Comm'n, 590 P.2d 674, 677 (Okla. 1979).[13] One of the cases upon which petitioners rely elaborates the importance which Oklahoma places upon protecting *both* the orders of district courts, *and* orders of the Commission, from collateral attacks in the other forum. *Fent v. Oklahoma Nat. Gas Co.*, 1994 Westlaw 534502, 1994 Okla. LEXIS 125, Docket No. 79,243 (Okla. October 4, 1994). "The law's protection against an impermissible collateral attack prevents both the district court and the Commission from encroaching upon each other's jurisdiction by entertaining inquiries into issues that stand decided by the other tribunal." *Id.*, 1994 Westlaw 534502 at p.*5.

Pelican Production Corp. v. Wishbone Oil & Gas, Inc., 746 P.2d 209 (Okla.Ct.App. 1987) illustrates the application of these principles in analogous circumstances. In *Pelican* two oil and gas companies had drilled wells into the same section. One company sued the other alleging conversion of oil and gas from the formation for which its well had been designated as the unit well. *Id.* at 211. The same contention had been previously made to, and rejected by, the Oklahoma Corporation Commission. The district court dismissed for lack of subject matter jurisdiction, holding that the action constituted a collateral attack on the Commission's order. *Id.* On appeal, the Court of Appeals acknowledged that the Commission had no power to award damages in a private lawsuit for conversion. However, the court affirmed, holding the district

---

[13] Even an action for damages which seeks only a clarification of a Commission order is a collateral attack, since any such clarification must be made solely by the Commission. *E.g., Drake v. Southwest Davis Unit*, 698 P.2d 15, 16-17 (Okla. 1985).

court had properly concluded that it lacked subject matter jurisdiction since the Commission's determination that the defendant was not in violation of its drilling and spacing order precluded any lawsuit for conversion. *Id.* at 212. The court observed that the Commission's order had become final, and that the plaintiff was "attempting to relitigate this issue in district court and, thus, is attacking the Commission's order collaterally." *Id.*[14] Although petitioners cite the wrong rule, their statement at n.6 that *Pelican* is not precedential is correct; however, under Oklahoma law such opinion "shall be considered to have persuasive effect." 12 Okla. Stat. 1991, Ch.15, App.2, Rule 1.200(C)(B).

Here, the Commission has established Section 14 as a drilling and spacing unit and has rejected petitioners' efforts to drill more than the single allowed well in the unit. Petitioners action against Conoco for actual and punitive damages because of Conoco's *failure* to drill the well which the Commission has disallowed is thus an impermissible collateral attack on the Commission's orders.

The Court of Appeals expressly so held in this case in its opinion. "We further hold that Conoco has established the applicability of *both* the doctrine of collateral estoppel *and* the state statute *prohibiting collateral attacks* upon Commission orders." (Emphasis supplied.) Pet. App. at

---

[14] This is in accord with other decisions, including those applying other states' laws. *E.g., Mize v. Exxon Corp.*, 640 F.2d 637, 639-40 (5th Cir. 1981); *Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1417 (10th Cir.), *cert. denied*, 498 U.S. 942 (1990); *Mayer v. Tidewater Oil Co.*, 218 F.Supp. 611, 612-15 (W.D.La. 1963).

6.[15] Petitioners do not challenge this holding in their petition for a writ of certiorari. Thus, even if they were correct in contending that Conoco failed to preserve its contention as to collateral estoppel, it would not change the result in this case.

III. PETITIONERS' OTHER ARGUMENTS WERE NOT RAISED BELOW AND ARE MERITLESS

The arguments made by petitioners in their Propositions II, III, IV and V were never presented to the Court of Appeals, notwithstanding that collateral estoppel was the paramount issue presented by Conoco on appeal – a sufficient reason in itself to decline review of the issues on certiorari.[16] These new arguments also lack merit.

Due Process: The due process argument in Proposition II has never been raised before by petitioners at any stage of this litigation. It is purportedly founded on the limited jurisdiction of the Commission, since the Commission is not authorized to adjudicate a claim for damages based on the drainage which it found had not occurred in this case. The fallacy of that argument is apparent. Collateral estoppel does not require adjudication of any particular claim, as does *res judicata*. Collateral estoppel precludes relitigating the same *issues* of fact or

---

[15] *See also* the Court's discussion of collateral attack in the context of petitioners' contention that the pendency of Great Bear's appeal from the Commission's order prevented it from being final for purposes of collateral estoppel, Pet. App. at 17-18, quoting and discussing 52 Okla.Stat. 1991, § 111.

[16] Stern, Gressman, Shapiro and Geller, Supreme Court Practice § 6.26 (7th ed. 1993). *E.g., Delta Air Lines, Inc. v. Rosemary August*, 450 U.S. 346, 362 (1981).

law which the parties have previously litigated (Pet. App. at 11) – here the factual question of whether uncompensated drainage occurred.

Petitioners primarily rely for their due process argument on *Tidewater Oil Co. v. Jackson*, 320 F.2d 157 (10th Cir.), *cert. denied*, 375 U.S. 942 (1963), holding that a Kansas Corporation Commission order allowing waterflood operations did not prevent plaintiffs' action for damages for trespass and nuisance for the destruction of their wells. The Kansas Corporation Commission had only *permitted* the flooding operations (not mandated them), and expressly stated in its order that " 'an action for damages for the flooding of producing wells may be available to the owners of such wells. . . . ' " *id.* at 160.[17] Here, of course, Conoco and all others were *prohibited* by the Commission's order from drilling another well, so plaintiffs have not sued Conoco for failing to take action which was within its lawful prerogative – but for failure to *defy* the lawful order of the Commission prohibiting any additional well.

---

[17] The court in *Tidewater* rejected the proposition that the Kansas Corporation Commission's orders could not otherwise have preclusive effect, stating: "We think, however, that a suitor may have a full day in court in an administrative tribunal, on matters within its competence, quite as effectively and conclusively as any other adjudicatory tribunal." *Id.* at 161. Notably, the court reversed the punitive damages awarded notwithstanding that the Kansas Corporation Commission had expressly held it was not deciding any right to future actions for damages, because the operations were done under color of that Commission's permission. *Id.* at 165.

Leck v. Continental Oil Co., 800 P.2d 224 (Okla. 1989), relied upon by petitioners at pp.13-14,[18] was a decision on a certified question from the Tenth Circuit, and the Oklahoma Supreme Court expressly did not reach the issue of the collateral estoppel effect of the Commission's findings because it was "not ripe for review." *Id.* at 228. However, both the district court and the Tenth Circuit in that case did subsequently address the collateral estoppel issue, and reached the same result as in this case. *Leck v. Continental Oil Co.*, 971 F.2d 604, 606-607 (10th Cir. 1992) (not cited by petitioners).

Where a state conservation agency acting in a judicial capacity resolves facts properly before it, and the parties have had an adequate opportunity to litigate, as here, it is well settled that the agency's decision is entitled to the same preclusive effect to which it would be entitled in the state's courts. *Amoco Production Co. v. Heimann, supra,* 904 F.2d at 1414-15.

The report of an appointed advisory committee to the Commission quoted by petitioners at 15, which is not in the record, is one making recommendations for a statutory *change* of the law, and those recommendations have never been adopted. Moreover, the recommendations are contained in a section of the report dealing only with "Environmental Pollution Prevention and Abatement," not involved in this case, and even as to that narrow area proposes to keep the "Commission findings of *rules* violation from being treated as dispositive as to liability in civil cases" (emphasis supplied), also not involved here.

---

[18] Petitioners cite the case for their assertion that applying collateral estoppel denies them due process.

The other cases cited by petitioners are either irrelevant to the issues presented here, or actually support Conoco. *Fent v. Oklahoma Nat. Gas Co.*, 1994 Westlaw 534502, 1994 Okla. LEXIS 125, Docket No. 79,243 (Okla. October 4, 1994), cited by petitioners at 13 n.5 and 15 n.6 is illustrative. The court there did not even reach the issue for which petitioners cite the case in their note 5, that "claims for money damages based upon breaches of contract and in tort are properly before a district court, not the Commission." Rather, the court applied the doctrines of both *collateral estoppel* and *collateral attack* to prevent relitigation of the final prior determination that the district court had jurisdiction of the claims – carefully noting as to each doctrine that it applies equally where the Commission is the first to decide the relevant questions. *Fent, supra*, 1994 Westlaw 534502 at pp. *4-5. And in *Carris v. Thomas*, 1995 Westlaw 142562, 1995 Okla. LEXIS 44, Docket No. 82,952 (Okla. April 4, 1995) cited by petitioners at 13 n.5, the court held that an arbitration proceeding to which two defendants in a subsequent civil case were not parties did not collaterally estop plaintiff, particularly because the arbitration award did not reflect the issues actually determined.

Standard of Proof: The argument that petitioners were subject to a different standard of proof and thus cannot be barred by collateral estoppel is spurious. The "substantial evidence" standard of proof referred to in their note 7 is not the proof required to show uncompensated drainage, but to show "that there has been a change in conditions or a change in knowledge of conditions" to justify departure from the original spacing order which prohibited more than one well. *Mustang Production Co. v. Corporation Comm'n*, 771 P.2d 201, 203 (Okla. 1989). Here

the Commission did not disallow an additional well because of a failure of the applicant and petitioners to show the alleged drainage was a new condition or was recently discovered. Relief was denied because there was no showing of the alleged uncompensated drainage *at all.* The Commission held that:

> Any drainage occurring in Section 14 is compensated for through production of the [existing well]. To allow an additional well to be drilled and produced in Section 14 would result in damage to the correlative rights of owners in adjacent sections.

10th Cir. Aplt.App. at 403, ¶6.

Moreover, even if the "substantial evidence" standard had been applied it would not assist petitioners in their argument. First, it is if anything a *lesser* burden than the preponderance standard which plaintiffs had in this case. *See Mustang Production Co. v. Corporation Comm'n,* 771 P.2d 201, 204 (Okla. 1989) ("Substantial evidence" means " 'something more than a scintilla; possessing something of substance and of relevant consequence carrying with it a fitness to induce conviction, but remains such that reasonable men may fairly differ on the point of establishing the case.' "). Second, even if it could be argued that the "substantial evidence" standard imposed a heavier burden of persuasion than the "preponderance" standard, it is plainly not a "significantly heavier burden," as would be necessary to deprive it of collateral estoppel effect.[19]

---

[19] Collateral estoppel in this case is governed by state law, and "the Oklahoma Supreme Court follows the Restatement in

Notice in Commission Proceeding: Petitioners' assertion at 17 that "they did not receive proper notice of the proceedings" is unclear. If petitioners mean they actually did not receive notice, the assertion is contrary to the record, as reflected in the Court of Appeals' opinion, Pet. App. at 4 and 12-13 and Conoco's Statement of the Case.[20] Further, the "drainage issues" were specifically denominated in petitioners' contract with Great Bear and were the centerpiece of the Application before the Commission in the proceedings where they intervened and fully participated as parties through their own separate counsel.

If petitioners mean that due process required notice that the doctrine of collateral estoppel applied to the Commission's adjudication of fact issues, petitioners cite no authority for the assertion, and Conoco is not aware of any. Even authority cited by petitioners shows that collateral estoppel applies equally regardless of whether the

---

formulating its collateral estoppel doctrine," Pet. App. at 19. Restatement of Judgments (Second) § 28(4) (1982), also cited by petitioners in their note 7, provides that collateral estoppel does not apply where the party against whom it is asserted "had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action;. . . . " *See also* comment *f*.

[20] All Commission adjudicative proceedings must be accompanied by notice which satisfies federal and state due process standards, *Harry R. Carlile Trust v. Cotton Petroleum Corporation*, 732 P.2d 438, 442-43 (Okla. 1986), *cert denied*, 483 U.S. 1021 (1987), an issue never raised by petitioners at any stage of this case.

first tribunal to decide the matter is a district court or the Commission.[21]

Right to Jury Trial: Finally, petitioners' argument in Propositions IV and V that their right to trial by jury has been infringed by applying collateral estoppel is one already expressly rejected by this Court. *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 335-37 (1979).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

CLYDE A. MUCHMORE
(*Counsel of Record*)
HARVEY D. ELLIS, JR.
- Of the Firm -
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7700

Attorneys for Respondent

July, 1995

[21] *Fent v. Oklahoma Nat. Gas Co., supra*, 1994 Westlaw 534502 at pp. *4-5.